STATE OF MICHIGAN

COURT OF APPEALS

DESIGN & BUILD, INC. OF LANSING, Plaintiff-Appellee, v BARRY F. DEVINE and KAREN J. DEVINE, Defendants-Appellants.	UNPUBLISHED April 30, 2002 No. 224383 Ingham Circuit Court LC No. 98-088790-CK
BARRY F. DEVINE and KAREN J. DEVINE, Plaintiffs-Appellants, v DESIGN & BUILD, INC., Defendant-Appellee, and PHILLIP D. CROCKETT and SANDRA J. CROCKETT, Defendants.	Nos. 224384; 224447 Ingham Circuit Court LC No. 99-090125-CK

Before: Fitzgerald, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

In Docket No. 224383, defendants Barry F. and Karen J. DeVine, husband and wife, appeal by leave granted the order in lower court number 98-088790-CK denying their motion to set aside a December 16, 1998, default judgment entered pursuant to MCR 2.603(D)(1) and 2.612(C)[1] (Suit 1). In Docket No. 224384, plaintiffs DeVine appeal by leave granted the order in

[1] Because each of the parties is both a plaintiff in one of the two lower court actions and a defendant in the other, they will be referred to by their names preceded by their status where (continued…)

lower court number 99-090125-CK to set aside the December 16, 1998, default judgment in Suit 1 pursuant to MCR 2.612(C)(1)(f) and (3) (Suit 2). In Docket No. 224447, plaintiffs DeVine appeal as of right the order dismissing Suit 2. These three appeals were consolidated by order of this Court. We affirm.

Barry DeVine and Peter Crockett started Design & Build (D&B) and a partnership, Design & Build Associates (the partnership). In 1990, DeVine and Crockett agreed that D&B would buy out the DeVines' stock (which was apparently in the names of both Barry and his wife Karen) by making monthly payments over time pursuant to a promissory note. In 1998, D&B concluded that the buy-out was complete, but the DeVines contested that conclusion and refused to turn over their stock. D&B filed Suit 1 requesting reformation of the promissory note and a declaratory judgment that the note allowed accelerated payments. Counsel for D&B inquired of attorney Thomas Woods whether he would accept service of process. Attorney Woods, after receiving authorization from Barry DeVine, informed counsel for D&B that he would accept service of process. The summons and complaint were served on attorney Woods, and Woods signed the acknowledgement of service "on behalf of Barry F. DeVine and Karen J. DeVine." Woods gave the summons and complaint to Barry DeVine. No answer to the complaint was filed.

An amended complaint was filed on November 2, 1998. It contained both counts from the original complaint and added a third, asking that the court find payment in full of the promissory note and order specific performance regarding the tender of the DeVines' stock. The amended complaint was served on Woods without a second summons. A default judgment was entered in that action.

Eight months after the default judgment, the DeVines filed Suit 2, alleging, inter alia, that D&B had not paid in full for the stock, and moving to set aside the default judgment. The court denied the motion and granted summary disposition in favor of D&B on the ground that the default judgment was res judicata. The DeVines then filed another motion, this time in Suit 1, to set aside the default judgment. The court treated this motion as an untimely motion for rehearing of the motion to set aside in Suit 2 and denied it. Two days later, the court dismissed the remainder of Suit 2 as a sanction for the DeVines' noncompliance with an order to compel discovery.

On appeal, the DeVines first challenge the validity of the default judgment on several different grounds. The DeVines first assert that the circuit court did not have personal jurisdiction over Karen DeVine and that the notice of default and request for default judgment should have been served on them personally.

A court can acquire personal jurisdiction over a party either by service of process or when the party appears. See, e.g., MCR 3.103(I)(2). A party appears by attorney if the attorney performs "an act indicating that the attorney represents a party in the action." MCR 2.117(B)(1). Participation by an attorney in settlement negotiations after an action has been filed is an act that, alone, is sufficient to constitute an appearance for the parties represented. *Ragnone v Wirsing*,

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necessary for clarity.

141 Mich App 263, 265-266; 367 NW2d 369 (1985). Attorney Woods, who represented the DeVines in Suit 2, stated to the court on their behalf with regard to the first motion to set aside the default judgment that "[b]etween the filing of [Suit 1] and the filing of an Amended Complaint [in that suit], the parties through their attorneys had many contacts and conducted extensive negotiations to resolve . . . certain Corporation matters." This was sufficient to give the court personal jurisdiction over Karen DeVine. *Ragnone, supra.* Because Woods in Suit 1 represented Barry and Karen DeVine, service on him of the notice of default and request for default judgment complied with the applicable court rules. MCR 2.603(A), (B); 2.107(B).

Second, the DeVines argue that the amended complaint on which the default judgment was entered was invalid because it was not filed in accordance with MCR 2.118, which provides that an amended complaint filed before a responsive pleading is received requires either consent of the defendants or leave of the court. MCR 2.118(A)(1). Failure to get permission of the court to amend a complaint is not good cause to have a default judgment based on that amended complaint set aside unless the defendant was prejudiced or misled by failure to do so. *Tucker v Eaton*, 147 Mich App 363, 372-373; 383 NW2d 20 (1985), rev'd on other grounds 426 Mich 179 (1986).

Here, the DeVines did not argue that they were prejudiced by D & B's failure to get leave of the court to file its amended complaint. Rather, they argued that because the amended complaint did not comply with MCR 2.118, it was not properly before the court. We disagree. In the absence of prejudice, leave to amend is a litigant's right. *Ben P Fyke & Sons, Inc v Gunter*, 390 Mich 649, 657; 213 NW2d 134 (1973) (defining prejudice as surprise or lack of opportunity to properly contest). Barry DeVine's affidavit submitted in support of the second motion to set aside the default judgment indicates that he was aware of the amended complaint before the default was entered and was aware of the default entered with respect to the amended complaint.[2] The DeVines chose not to respond to the amended complaint or to the default judgment as a matter of strategy. Because the DeVines had an opportunity to respond to both the amended complaint and the default judgment and chose not to do so, they suffered no prejudice as that term is defined in *Fyke, supra.* Further, service of the amended complaint on the DeVines' attorney without a second summons was proper. MCR 2.107(B).

Third, the DeVines argue that the court erred by failing to require proof of D & B's allegations before entering the default judgment. We disagree. The court rule governing default judgments gives the trial court discretion to require any evidence it deems necessary. MCR 2.603(B)(3)(b). The court did not abuse that discretion by questioning D&B's counsel and then declining to hear testimony from the witness he proffered[3]. *Alken-Ziegler, Inc v Waterbury*

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[2] Barry DeVine's affidavit states that he "did not object to release of the stock certificates" and that he knew that "if I did not respond [to the complaint] . . . that the stock certificates would be released to the corporation." These statements indicate that Barry DeVine was aware of the amended complaint before the default was entered and was aware of the default entered with respect to it because the original complaint did not request tender of the stock certificates.

[3] At the hearing on plaintiff D&B's request for default judgment, D&B's attorney stated, "I have a witness who can testify to these matters if the Court determines that under the default rules testimony is required." The court then asked, "What did DeVine get in return for the stock certificates?" Counsel answered, "Mr. DeVine has been fully paid." Without further

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Headers Corp, 461 Mich 219, 227; 600 NW2d 638 (1999) (defining abuse of discretion in the context of default judgments).

Next, the DeVines argue that the trial court erred by giving res judicata effect to the default judgment. We disagree. The issue of payment for the stock was raised in Suit 1, and a default judgment was entered in that suit. A default judgment has res judicata effect.[4] *Perry & Derrick Company Inc v King*, 24 Mich App 616, 620; 180 NW2d 483 (1970).

The DeVines also maintain that the trial court erred by considering the second motion to set aside the default judgment as a motion for rehearing of the first motion to set aside the default judgment. Because MCR 2.603 and 2.612 contain no proscription on multiple motions, the trial court should have considered the motion as a motion to set aside the default judgment.

Any error, however, was harmless. All motions to set aside a default judgment must contain both a showing of good cause and a meritorious defense unless they are based on lack of personal jurisdiction. MCR 2.603(D). The absence of either means the motion cannot be granted. *Alken-Ziegler*, *supra* at 230-234. "Good cause" is defined as either a procedural defect or irregularity that prejudiced the defendant or a reasonable excuse. *Id.* at 233. Here, neither motion presented good cause. There were no defects in the procedures leading to the default judgment and, therefore, to satisfy the good cause requirement the DeVines would have had to present a reasonable excuse. The DeVines did not make a mistake in allowing the default judgment to be entered; they admitted they did it intentionally as a matter of strategy. A tactical error cannot constitute a reasonable excuse to set aside a default judgment under MCR 2.612. Cf. *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997) (a tactical error cannot constitute extraordinary circumstances warranting relief under MCR 2.612). Accordingly, we conclude that the trial court reached the correct result, albeit for the wrong reason. *Hilgendorf v St John Hospital*, 245 Mich App 670, 685; 630 NW2d 356 (2001).

Last, the DeVines argue that the trial court abused its discretion by dismissing the remainder of Suit 2 following the DeVines' failure to comply with an order to compel discovery. We review an order of dismissal entered as a discovery sanction for clear abuse of discretion. *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998). Willful disobedience of a discovery order by conduct that is conscious or intentional justifies dismissal. *Welch v J Walter Thompson USA, Inc*, 187 Mich App 49, 52; 466 NW2d 319 (1991). In this case, the DeVines willfully failed to pay a discovery sanction[5] because they disputed the court's authority

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questioning, the court granted the motion.

[4] The DeVines also claimed in Suit 2 that part of the payment due for their stock consisted of an agreement that D&B would supply them with insurance and vehicles on a periodic basis. The court properly found that there was no question of material fact regarding the putative existence of this agreement and granted D&B summary disposition with regard to it pursuant to MCR 2.116(C)(10). *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 572; 609 NW2d 593 (2000). Any error the court may have made in also granting summary disposition regarding this agreement pursuant to MCR 2.116(C)(7) is therefore harmless and will not be addressed. *Hilgendorf, infra* at 685.

[5] The trial court issued an order to compel discovery that specifically states that the DeVines'

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to order them to do so by a date certain. A court's orders must be obeyed regardless whether they are partly or wholly based in error. *Ann Arbor v Danish News Co*, 139 Mich App 218, 229; 361 NW2d 772 (1984).[6]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra

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case would be dismissed with prejudice if they did not respond to D&B's interrogatories and request for documents by October 28 and that awarded $300 in costs and attorney fees to D&B to be paid within fourteen days.

[6] Although this alone would be sufficient to support the court's dismissal under the abuse of discretion standard of review, we note that the court's decision is also supported by the DeVines' intentional inaction allowing the default judgment to be granted and their initial eight-month delay in attempting to set it aside.